Filed 11/17/16 Perkins v. Superior Court CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

JESSE ALTON PERKINS, Petitioner, v. THE SUPERIOR COURT OF SHASTA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C082598 (Super. Ct. Nos. 16-1852, 16-2107)

Prior to a preliminary hearing in two criminal actions, petitioner Jesse Alton Perkins filed written peremptory challenges of Shasta County Superior Court Judge Cara Beatty. The judge denied the challenges as untimely. Because we conclude the challenges were timely filed, we shall issue a writ of mandate directing Judge Beatty to grant the challenges and to disqualify herself from further proceedings in the actions.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is charged with first degree residential burglary and other criminal offenses in two felony complaints. The first complaint was filed on March 25, 2016, case No. 16-1852.[1] Petitioner was arraigned on that complaint in Department 2 before Judge James Ruggiero on that date. The judge set a plea disposition hearing for April 6 and preliminary hearing for April 7. The March 25 minute order, like all of the minute orders in this case, advised that petitioner was ordered to appear in Department 2.

Petitioner appeared in Department 2 on April 6, before Judge Beatty, where the judge ordered petitioner to appear the following day for preliminary hearing. However, on the following day, again in Department 2 before Judge Beatty, the prosecutor announced his intention to file new charges against petitioner. Petitioner was arraigned on the second criminal complaint (filed on April 6), case No. 16-2107, and directed to appear for plea disposition and preliminary hearing on both actions, on April 26 and 27, respectively.

Petitioner appeared again in Department 2 on April 26, again before Judge Beatty, at which time the public defender announced a conflict in both of petitioner's cases. The trial court appointed Michael Khoronov to represent petitioner, and set plea disposition and preliminary hearing for May 18 and 19, respectively.

On May 18, petitioner appeared in Department 2, this time before Judge John Tiernan. Attorney Khoronov informed the court that he, too, found that he had a conflict. The trial court appointed petitioner's current counsel in his stead, and set plea disposition for June 2 and preliminary hearing for June 7.

On June 2, again in Department 2 before Judge Beatty, petitioner's attorney informed the court that the parties agreed to "put this matter over to June 23rd for a

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[1] All further references to dates are to the year 2016 unless otherwise indicated.

plea/set." The trial court ordered petitioner to return to court on June 23. On June 23 (Dept. 2, Judge Beatty), the "plea/set" hearing was again continued, to July 14.

On July 14, in Department 2, Judge Beatty once again set plea disposition and preliminary hearing, for August 16 and 17, respectively.

Also on July 14, petitioner filed two written "peremptory challenges," one under each case number, pursuant to Code of Civil Procedure section 170.6, with his attorney declaring under penalty of perjury that Judge Beatty is prejudiced against petitioner and petitioner cannot have a fair and impartial hearing or trial before the judge.[2] During a hearing on August 1, Judge Beatty rejected the challenges, indicating only: "I'm finding these challenges to be untimely." When petitioner's attorney attempted to argue regarding the challenges, Judge Beatty said she had already ruled.

On August 5, petitioner filed a petition for writ of mandate in this court, challenging the trial court's order denying the peremptory challenges. We stayed all proceedings in the trial court, and requested informal opposition from the People, who concede the trial court erred in striking the peremptory challenges. We subsequently notified the parties that this court is considering issuing a peremptory writ of mandate in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171), and provided an opportunity to file further opposition. We are in receipt of an opposition from the respondent superior court.[3]

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[2] Undesignated statutory references are to the Code of Civil Procedure.

[3] The respondent superior court is not a party to the proceeding and lacks standing to defend a writ proceeding challenging a disqualification order. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1065-1067, 1071; *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523, fn. 2.) However, the courts may treat an opposition filed by the respondent court as an amicus curiae brief when it provides insight as to the respondent court's procedures. (*Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315,

DISCUSSION

"An order denying a peremptory challenge is not an appealable order and may be reviewed only by way of a petition for writ of mandate. (§ 170.3, subd. (d).) The standard of review is abuse of discretion, and a trial court abuses its discretion when it erroneously denies as untimely a section 170.6 challenge." (*Daniel V. v. Superior Court* (2006) 139 Cal.App.4th 28, 39 (*Daniel V.*); but see *Swift v. Superior Court* (2009) 172 Cal.App.4th 878, 882 [standard of review is de novo].)

"The right to exercise a peremptory challenge under section 170.6 is a substantial right and an important part of California's system of due process that promotes fair and impartial trials and confidence in the judiciary. [Citation.] Courts must refrain from any tactic or maneuver that has the practical effect of diminishing this important right." (*Hemingway v. Superior Court* (2004) 122 Cal.App.4th 1148, 1158.)

"As a general rule, a challenge of a judge is permitted under section 170.6 any time before the commencement of a trial or hearing. [Citations.] If the general rule applies, petitioner's challenge is timely. Subdivision [(a)](2) of section 170.6, however, establishes three exceptions to the general rule, namely, the '10-day/5-day' rule, the 'master calendar' rule, and the 'all purpose assignment' rule." (*People v. Superior Court* (*Lavi*) (1993) 4 Cal.4th 1164, 1171 (*Lavi*).)[4]

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fn. 2; *Grant v. Superior Court*, *supra*, 90 Cal.App.4th at p. 523, fn. 2.) We will treat the respondent court's opposition as an amicus curiae brief.

[4] The master calendar rule is not implicated. Although the Superior Court of Shasta County, Local Rules, rule 9.01 (hereafter local rule) provides that a peremptory challenge must be made at the time a case is "set for trial," petitioner's cases had not yet been scheduled for trial. Further, although local rule 10.03 applies the master calendar rule when one felony home court department of the superior court assigns a preliminary hearing to another court department, that did not occur in this case, either.

1.0 The All Purpose Assignment Rule Does Not Apply

In the context of a criminal action, the all purpose assignment rule provides, in pertinent part: "If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance." (§ 170.6, subd. (a)(2).)

"[F]or a case assignment to be an all purpose assignment, two prerequisites must be met. [Citation.] First, the method of assigning cases must 'instantly pinpoint' the judge whom the parties can expect to ultimately preside at trial. Second, that same judge must be expected to process the case 'in its totality' [citation], from the time of the assignment, thereby 'acquiring an expertise regarding the factual and legal issues involved, which will accelerate the legal process.' " (*Lavi, supra*, 4 Cal.4th at p. 1180, fns. omitted; *Daniel V., supra*, 139 Cal.App.4th at p. 39 ["The first exception, all-purpose assignment, involves assignments that instantly pinpoint one judge who will be expected to preside at trial and to process the case in its totality from the time of the assignment . . . ."].)

None of the several court orders that set this case for further proceedings in Department 2 meet the first prong of this test. It is undisputed that the case was assigned pursuant to local rule 13.05(A), which provides in pertinent part: "All felony cases initiated on or after January 1, 1995, and all felony cases pending any proceeding on or before January 1, 1995, shall be assigned by the Presiding Judge, effective January 1, 1995, to one of two specific 'home court' departments for all proceedings and purposes *except for trials*." (Italics added.) Although the respondent court asserts that Judge Beatty is regularly assigned to preside in Department 2, one of two "home court" departments, because the assignment to Department 2 was for all purposes "except for

trials," the assignment was not an all purpose assignment. The assignment to Department 2 did not instantly pinpoint the judge whom the parties could expect to preside at trial.

2.0 The 10-day/5-day Rule Does Not Apply

The 10-day/5-day rule provides: "If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date." (§ 170.6, subd. (a)(2).)

Courts construing this language conclude that if a case is assigned to a department rather than to a particular judge, the peremptory challenge is timely if made more than five days before a postponed or continued hearing date. "There is an uncertainty necessarily inherent in the practice of assigning a cause to a particular department but not to a named judge. The all too common continuance adds unknown variables. A consequent and undue hardship on the litigant flows which negates the underlying thrust of Code of Civil Procedure section 170.6—to grant to the litigant a single reasonable opportunity to disqualify a *known* trial judge. To effectuate this legislative intent, the cases have evolved this rule: Where the hearing date is set, but postponed, a disqualification motion filed five days before the postponed date is timely. (*Eagle Maintenance & Supply Co. v. Superior Court* [(1961)] 196 Cal.App.2d 692, 694, 695; *Woodman v. Selvage* [(1968)] 263 Cal.App.2d 390, 394, 396; *People v. Escobedo* [(1973)] 35 Cal.App.3d 32, 37; *Zdonek v. Superior Court* [(1974)] 38 Cal.App.3d 849.)" (*In re Jose S.* (1978) 78 Cal.App.3d 619, 627-628 (*Jose S.*); see *People v. Hall* (1978) 86 Cal.App.3d 753, 758 ["where a cause is set for future trial before a particular *department*, a convincing array of authority supports the conclusion that a challenge

made at least five days before a continued or postponed trial date is timely"];
2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 143, pp. 201-202.)

The court in *Jose S.* applied the rule regarding postponement or continuance even though, as here, the case was assigned to a department with a known judge regularly assigned to that department. (*Jose S., supra,* 78 Cal.App.3d at pp. 626-627.) As the court explained in *People v. Superior Court* (*Hall*) (1984) 160 Cal.App.3d 1081, "A case in point is *In re Jose S.* [(1978)] 78 Cal.App.3d 619. After a series of continuances, a jurisdictional hearing was set for September 15. The case was assigned to a particular department, but not to a particular judge. However, Judge Kirk was the judge who usually presided in that department, and the minor filed a section 170.6 motion assuming that Judge Kirk would preside at the jurisdictional hearing. 'This was not an unreasonable assumption,' said the court, 'for an assignment to a particular department, not to a specific judge, is ordinarily regarded as notice a particular judge usually assigned to that department will hear the case.' (78 Cal.App.3d at p. 627.) The court found, however, that a section 170.6 motion was timely when filed more than five days prior to the last continued hearing date: '[A] change of judge may occur in the designated department. No certainty arises a particular judge will hear the case from the fact of assignment, only, to a department. Vacation, illness and reassignment are common occurrences and upset best laid plans.' " (*Hall*, at p. 1085.)

Here, although the case was initially assigned for a preliminary hearing to take place in Department 2 on April 7, the preliminary hearing date was vacated and the hearing postponed or continued by Judge Beatty. The preliminary hearing date was then vacated and postponed or continued three more times, twice by Judge Beatty and once by another judge sitting in Department 2. When, finally, on July 14, the matter was again assigned for preliminary hearing to take place in Department 2 on August 17, petitioner complied with the 10-day/5-day rule by filing the peremptory challenges on July 14,

more than five days prior to the August 17 preliminary hearing date. The peremptory challenges were timely.

The respondent court concedes the inapplicability of the all purpose assignment rule. But, respondent contends the peremptory challenges were untimely under the 10-day/5-day rule because Judge Beatty's regular assignment to Department 2 was at all times known by the parties, and thus when, on March 25, the case was initially set for preliminary hearing to take place in Department 2 on April 7, petitioner was obligated to file the peremptory challenge more than five days prior to April 7, or more than 5 days prior to any of the continued preliminary hearing dates. The respondent court simply ignores the long line of authority regarding the continuance or postponement of a hearing, discussed above.

We note that this is the second time this year that this court has been required to reverse an order issued by Judge Beatty, which incorrectly struck a peremptory challenge against her as untimely.[5] We anticipate Judge Beatty in the future will ensure each litigant's due process right to exercise a peremptory challenge. And we are troubled in this case that petitioner's attorney was not allowed to present his argument regarding the timeliness of the peremptory challenges.

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent superior court to vacate the August 1, 2016 orders denying the peremptory challenges filed against Judge Beatty in Shasta County case Nos. 16-1852 and 16-2107, and to enter new orders granting the peremptory challenges and disqualifying Judge Beatty from presiding in those cases. Upon finality of this opinion, the stay issued by this court on August 12,

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[5] We take judicial notice of this court's records in *Harvey v. Superior Court*, case No. C080803. (Evid. Code, § 452, subd. (d).)

2016, is vacated. To promote the interests of justice, this decision is final in this court upon its filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

BUTZ, Acting P. J.

We concur:

MAURO, J.

RENNER, J.